Construction arbitration (2019)

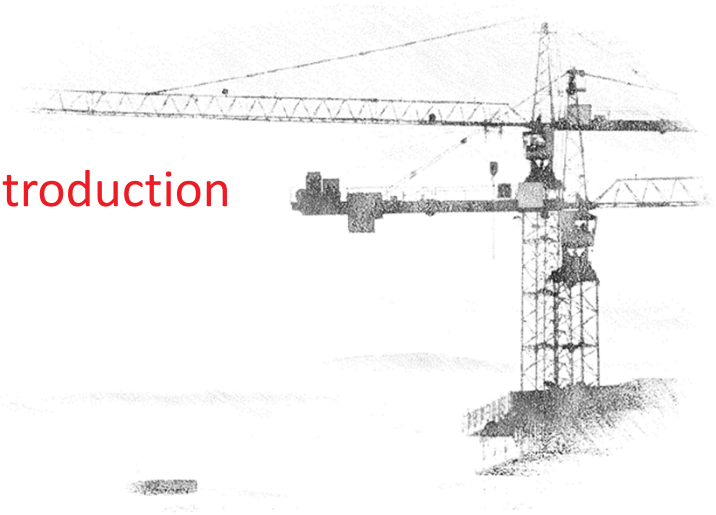
28th October 2019

Before viewing this webinar, please visit www.lexiswebinars.co.uk/test-your-system to ensure that your network and PC are configured correctly.
Tip: Press F11 on your keyboard to enlarge the webinar player.

Construction arbitration (2019)

The law as stated during this webinar is up to date as of **17th October 2019**

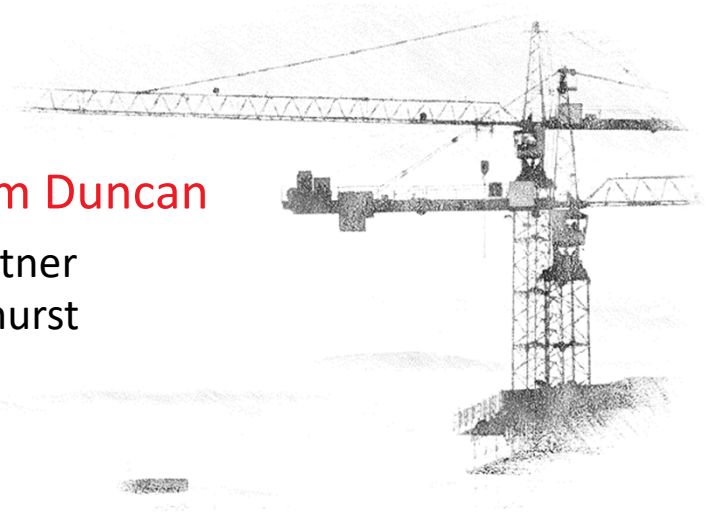
Introduction



LexisNexis

Tom Duncan

Partner
Ashurst



Drafting for arbitration

Catering for ADR

Use of ADR

- Arbitration is very much a last resort
  - Time-consuming
  - Expensive
  - May lead to project delays and disruption
- Various alternatives available for final or interim resolutions:
  - Expert determination
  - Dispute Boards
  - Early Neutral Evaluation
  - Negotiation and mediation
- But if dispute provisions are not drafted properly:
  - Satellite litigation
  - End up in the wrong forum

Plot your course

- Identify the types of disputes likely to occur and remedy required
  - Delay and disruption
  - Defects claims
  - Urgent injunctive relief?
- How are those best resolved?
  - Technical disputes could go to expert determination
  - Disputes during implementation – Dispute Boards
  - Arbitration as the ultimate destination?
- Dispute Board decisions
  - FIDIC says final and binding unless revised by arbitration.
  - Requirement for "notice of dissatisfaction"
  - Include wording to enable enforcement of decision by an arbitral award in the meantime

Mandatory process before arbitration?

- To mediate or not to mediate?
  - Puts ADR on the agenda
  - But often will be too early and can cause delay
- Mandatory process or not?
  - English courts will enforce the process if mandatory
  - A mandatory process will need to be completed before arbitration commenced: any tribunal will not have jurisdiction
  - Either way make it very clear
  - If mandatory consider a saving provision

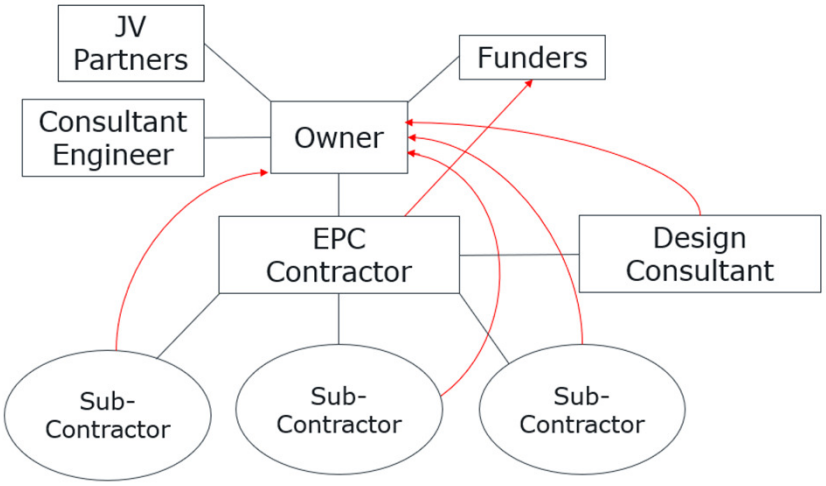
Structure and timetabling

- Series of steps
- Need to know when one step ends and the next one is triggered
- Ensures no delays
- Ensures no arguments over jurisdiction
- Don't just recycle: always look at the time limits – do they work for you?

Drafting for arbitration

Joinder and consolidation

Why is this a problem in a construction context?



Mechanisms used

- Umbrella agreement
  - Difficult to draft
  - Need to ensure the scope is broad so captures all possible disputes
  - But you do secure everyone's agreement: no issue with consent
- Back to back DRPs
  - Specialist advice required
  - Careful identification of related contracts, disputes and additional parties
  - Could have arguments on consent
- Not guaranteed to work in either case

Institutional approach

- Leading institutional rules now cover both joinder and consolidation
- Each institution takes a different approach
- But consent is still key
- What that means in practice:
  - Still need to draft for consolidation and joinder
  - But the drafting should not conflict with the institution's approach
  - May influence your choice of institution

Institutional approach

ICC: Articles 7-10

- Article 7: permits the joinder of "additional parties" on application to the Secretariat.
- Article 8 permits claims between multiple parties
- Article 9: permits claims under more than one contract t be heard in a single arbitration
- Article 10: permits consolidation of disputes

LCIA: Article 22 (tribunal's additional powers)

- Art 22 (viii) permits joinder of third persons – but requires their consent in the arbitration agreement (or once the dispute arises)
- Art 22 (ix) and (x) deals with consolidation – where parties to the different arbitrations have agreed or where between the same parties

Rebecca Shorter

Partner
White & Case LLP

Disclosure in Construction Arbitration

Disclosure in Construction Arbitration

- Disclosure in arbitration
  - Institutional rules
  - IBA Rules
  - Prague Rules
- The evolving landscape
  - E-disclosure software
  - Lessons that can be learned from the courts
  - Approaches for the efficient management of disclosure

Disclosure in Arbitration

Disclosure in Arbitration

- Parties are expected to produce the documents on which they rely. No automatic right to the production of documents from the other party
- Institutional rules provide the tribunal with the power to order the production of documents:
  - LCIA Rules (2014), Article 22.1(v): the tribunal may "… order any party to produce … documents or copies of documents in their possession, custody or power which the Arbitral Tribunal decides to be **relevant**";
  - ICC Rules (2017), Article 25: provides the tribunal with a general mandate to establish the facts by all appropriate means. Appendix IV includes case management techniques for handling document production;
  - SIAC Rules (2016), Rule 27: the tribunal may "order any party to produce … for inspection, and to supply copies of, any document in their possession or control which the Tribunal considers **relevant** to the case and **material** to its outcome".

Disclosure in Arbitration (cont'd)

- In international arbitration, there may be differing expectations between the parties on how the disclosure process will be managed
- In addition to institutional rules, parties may adopt additional rules to supplement them, and provide more detailed guidance
- IBA Rules on the Taking of Evidence in International Arbitration (2010), Article 3: request to produce identifiable documents, or **narrow and specific** categories of documents, that are **relevant** to the case, and **material** to its outcome
- The Prague Rules on the Efficient Conduct of Proceedings in International Arbitration (2018), Article 4: "Generally, the arbitral tribunal and the parties are encouraged to avoid any form of document production, including e-discovery." Requests to be made at the CMC for specific documents that are **relevant** and **material** to the outcome of the case
- Emphasis on limited disclosure of important documents only

The Evolving Landscape

The Evolving Landscape

- Construction has always been a document heavy industry but technology has changed the way we live and work
- The challenge first presented to parties in the courts is now relevant to arbitration, notwithstanding the more limited nature of disclosure
- Manual review may no longer be an effective option (time, cost, comprehensiveness)
- The advent of e-disclosure software: technology assisted review and predictive coding
- The proliferation of electronic documents presents both a challenge and an opportunity in dispute resolution
- What lessons can we learn from the courts?

The Evolving Landscape (cont'd)

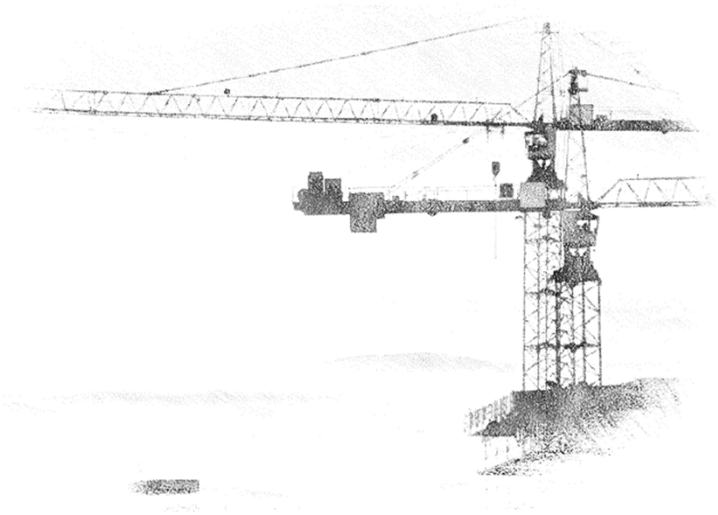
- There is judicial approval of predictive coding; see **Pyrrho Investments vs MWB Property [2016]** EWHC 256 (Ch)
- Getting it wrong can be expensive:
  - Failure to agree search terms and procedures may result in procedural disputes about whether your searches are adequate; see **Digicel (St Lucia) Ltd and others v Cable & Wireless plc and others [2008]** EWHC 2522 (Ch);
  - An order to re-do, manually, the review of documents previously checked for relevance using Computed Aided Review: **Triumph Controls UK and another v Primus International Holding and others [2018]** EWHC 176 (TCC).
- But new opportunities exist: **BSkyB vs HP Enterprises [2010]** EWHC 86 (TCC): fraudulent misrepresentations were found to have been made, in part due to metadata showing that documents had been altered

Efficient Management of Disclosure

- ICC Commission Report 'Managing E-Document Production'
  - Use of e-disclosure software
  - Data Sampling
  - Cost Shifting
- In the 2018 International Arbitration Survey undertaken in partnership between the School of International Arbitration at Queen Mary University of London and White & Case LLP, 61% of respondents were of the view that "increased efficiency, including through technology" is a factor that would likely have a significant impact on the future evolution of international arbitration

Upcoming Construction webinars

- Construction – Case Law Update 2019 – 13th December 2019



LexisNexis

On Demand Construction webinars

- Interim payments in 2018 – Available until 20th February 2020
- Standard form contracts in use (2018) – Available until 20th March 2020
- Procurement routes in 2018 – Available until 17th April 2020
- Construction disputes: mediation, arbitration and litigation (2018) – Available until 15th May 2020
- The latest on Building Information Modelling (BIM) (2018) – Available until 29th June 2020
- Intellectual property in construction (2018) – Available until 18th September 2020
- Payment under the 'Construction Act' (2019) – Available until 5th March 2021
- Retention of payment (2019) – Available until 3rd June 2021

Thank you and reminders

- This webinar is designed to help solicitors meet requirements A2 (Maintain competence and legal knowledge) and A4 (Draw on detailed knowledge/understanding) of the SRA's Statement of solicitor competence. You may also use the quiz, which can be accessed via the "Take a quiz" link on the webinar details page, to reinforce your understanding of the webinar content. You should answer 7 out of 10 questions correctly and will have two attempts at the quiz.
- Please submit feedback via the survey screen.
- This webinar will be archived immediately, and will be available to view on-demand for 24 months.
- A transcript of the webinar can be made available on request within 48 hours.
- You can use the training and evaluation record form which is included in the supporting materials for this webinar to log this training activity and how it relates to the continuing competences that the SRA requires from all solicitors.

If you have any queries, please contact us:

webinars@lexisnexis.co.uk

+44 (0) 330 161 2401

@LexisUKWebinars

lexisnexis-webinars

LexisNexis

Thank you for attending.

We hope you've enjoyed this session.

Bespoke in-house training solutions

- Tailored for your business
- Extensive portfolio of expert presenters
- All areas of legal practice covered
- Location of your choice

Find out more - http://www.lexiswebinars.co.uk/in-house-training

LexisNexis